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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

HEWITT-ROBINS INCORPORATED,

Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peitioner, Hewitt-Robins Incorporated, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 25, 1961.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 187 F. Supp. 722, and is also printed in the record submitted to the Court below at pages 24a-26a.

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Moore (*infra*, Appendix A, pp. 12-22) are not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 25, 1961 (*infra*, Appendix B, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented

Whether the common law action for damages sustained by a shipper by reason of motor carrier misrouting of a shipment of goods has survived the enactment of the Motor Carrier Act §§201, *et seq.*, Part II of the Interstate Commerce, 49 U. S. C. §§301-327.

Statute Involved

The chief statute involved is the Motor Carrier Act §§201, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327, the pertinent portion of which is Section 216 (j) of the Motor Carrier Act [49 U. S. C. §316 (j)] providing as follows:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Statement

This is an action by petitioner, a shipper of goods, against respondent, a common carrier by motor vehicle, to recover damages sustained by petitioner by reason of respondent's misrouting of numerous shipments of the petitioner.

Between January 1, 1953 and February 1, 1955, the petitioner delivered numerous shipments of foam rubber pads to the respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City, N. Y. The respondent possessed operating rights over an

interstate route between those points, as well as an intrastate route. The applicable rates for the interstate movement, as published in tariffs on file with the Interstate Commerce Commission, were higher than the applicable rates for the intrastate movement, as published in tariffs on file with the Public Service Commission of New York. These shipments were tendered unrouted by the petitioner.

In the first count of the complaint herein (R. 2a) the petitioner alleges that the respondent transported said shipments over its higher-rated interstate route, and that by reason thereof the respondent charged and collected from the petitioner the sum of $10,000.00 in excess of the charges that would have accrued if the respondent had moved the shipments over the less expensive intrastate route. The petitioner demands judgment in that amount.

The first count of the complaint (R. 2a) alleges the conclusion of law that the respondent's conduct was an unreasonable practice in violation of the Interstate Commerce Act. It is also requested therein that the proceedings in this action be held in abeyance pending the filing of a complaint by the petitioner with the Interstate Commerce Commission for an order "determining the reasonable and just rates for the transportation of the aforesaid shipments".

Proceedings thereafter instituted by petitioner before the Interstate Commerce Commission resulted in a report made by the Commission, in which a finding was made that the lower-rated route should have been used by respondent in transporting said shipments. The Commission also found that the practice of respondent in using its higher-rated interstate route was an unreasonable practice. The report is published in *Hewitt-Robins, Incorporated* v. *Eastern Freight-Ways, Inc.*, 302 I. C. C. Reports 173.

Respondent, being dissatisfied with the Commission's decision, commenced an action against the United States of America and the Interstate Commerce Commission in the

United States District Court for the District of New Jersey, to set aside the report and order of the Commission made in said proceedings. Petitioner was not made a party to that action. The case was tried before Judge Richard Hartshorne in the United States District Court for the District of New Jersey, but no decision has been made therein, and such decision is being held in abeyance pending the determination of the instant petition and the appeal in the event the instant petition is granted.

Subsequent to the commencement of this action and after the trial of the New Jersey action, the Supreme Court of the United States handed down the decision reported as *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464. Respondent urged in the Courts below that this decision requires a dismissal of the complaint herein. District Judge Alexander Bicks in an opinion (R. 24a), reported in 187 F. Supp. 722, agreed with respondent's contention, held that the savings clause of the Interstate Commerce Act, 49 U. S. C. § 316(j) did not preserve the common law remedy of a shipper against a motor carrier to recover damages for misrouting, and made an order dismissing the complaint (R. 27a) on the ground that no justiciable issue is presented upon which any relief may be granted to petitioner.

Upon appeal from the District Court's dismissal of the complaint, the Court of Appeals affirmed (*infra*, Appendix A, pp. 12-22), one Judge dissenting (*infra*, Appendix A, pp. 16-22). The opinions are not yet reported.

Basis Of Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the diversity of citizenship of the parties.

Reasons For Granting The Writ

The pronouncement of the Courts below that a suit by a shipper against a motor carrier to recover damages for

misrouting is not judicially cognizable is in conflict with the decisions in this Court and in other courts of appeal.

Under the common law where a carrier maintains different rates on the same traffic over two open routes between the same points, and the freight rate over one route is less than such rate over the other route, if other conditions are reasonably equal, it is the duty of the carrier to transport the shipments between those points over the line which will give the shipper the benefit of the cheaper rate. *Northern Pacific Railway Co.* v. *Solum*, 247 U. S. 477, 482.

The decision sought to be reviewed is irreconcilable with that of the Third Circuit in *Woolegan Transportation Co.* v. *George Rutledge Co.*, 162 F. 2d 1016 (1947). In that case the motor carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

> "* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fredericktown, * * *. Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

It seems clear that a delivery of a shipment to a carrier and acceptance by it without routing instructions, has the effect of writing into the contract of carriage a covenant to

the effect that the carrier shall select the cheapest available route, all conditions being equal.

In *S. W. Shattuck Chemical Co.* v. *T. & M. Transp. Co.*, 134 F. 2d 394, C. C. A. Tenth Circuit (1943), it was held that in an action by an interstate motor carrier to recover under-charges of freight by reason of shipment over a route selected by the carrier, it was error to strike the shipper's answer and cross-petition alleging that there were other available routes over which rates did not exceed the amount paid and one of such routes should have been used.

In a subsequent appeal after a trial in that case, reported in *T. & M. Transp. Co.* v. *S. W. Shattuck Chemical Co.*, 148 F. 2d 777 (1945), the Circuit Court of Appeals, Tenth Circuit, stated that if an interstate motor carrier promises to select the cheapest available rate and route and to ship merchandise accordingly, and fails to do so, it is liable to the shipper in damages for the difference between the rate charged and the cheapest applicable and available rate, citing *Northern Pacific R.* v. *Solum*, 247 U. S. 477; *Western Grain Co.* v. *St. Louis-San Francisco R. Co.*, 5 Cir., 56 F. 2d 160; *Galveston, H. & S. A. R. Co.* v. *Lykes Bros.*, D. C., 294 F. 968; *St. Louis Southwestern R.* v. *Lewellen Bros.*, 5 Cir., 192 F. 540; *Roberts Federal Liabilities of Carriers*, Second Edition, Sec. 332, p. 659.

The Courts below have held that the decision of this Court in the case of *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464, authorizes the conclusion that the Motor Carrier Act has destroyed the common law action for damages sustained by a shipper as a result of motor carrier misrouting and has left him without any remedy against such unlawful conduct. Needless to say, such harsh result can bring about shocking consequences in the area of national motor transportation. In remarks by General Counsel of the Interstate Commerce Commission, expressing the views of the Interstate Commerce Commission,

that the decision of this Court in *T. I. M. E. supra*, has no application to the case at bar (R. 22a), appears the following:

> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier."

In *T. I. M. E. supra*, this Court in stating the issue before it for decision, said at page 165:

> "These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?"

This question was answered in the negative in a 5 to 4 decision, the Court holding, in substance, that a shipper does not have a justiciable legal right to recover past motor carrier charges to the extent that such charges were *intrinsically* unreasonable. There was no question of misrouting. No claim is being made in the case at bar that the rates charged by the respondent carrier are unreasonable *per se*. The real claim is that the carrier subjected the petitioner herein to wrongful charges by transporting its shipments over more expensive interstate routes contrary to respondent's duty, as a common carrier, to transport the unrouted shipments over the less expensive intrastate routes, in the absence of adequate justification for failure to do so.

Although the respondent carrier's practice in transporting the shipments over the higher-rated route may be characterized as an "unreasonable" one, nevertheless, it is not necessary to label it in such manner in order to state a cause of action. The allegations in the first count of the complaint (R. 2a), employing the words "reasonable" and "unreasonable", are conclusory and mere surplusage and cannot have the effect of casting this simple misrouting action into the class of actions involving intrinsic unreasonableness of rates, proscribed by *T. I. M. E., supra*. Although misrouting has been classified as an unreasonable practice, nevertheless, misrouting claims involve the payment of legal and supposedly reasonable charges resulting from the use of a higher rated route than an equally available lower rated route, each rate being the legal rate for its particular route, not whether either rate is unreasonable for application over its particular route. This difference, it is respectfully submitted, prevents the *T. I. M. E.* case from being applicable to claims for misrouting.

In the case of *Miller* v. *Davis, Director General of Railroad*, 213 Iowa 1091 (Sup. Ct. Iowa, 1932), a misrouting action, the Court said in part:

> "This is not a case in which the reasonableness of a rate is involved. It is a case in which it is claimed the wrong rate was applied because the goods were shipped by the wrong route, contrary to the rights of the shipper."

In the case of *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (U. S. D. C., S. D., Texas, 1923), the Court recognized the principle that where a shipper gives no routing directions, and the carrier forwards the traffic over one route when another route carrying a lower rate is equally available, the carrier must refund to the shipper the difference between the higher rate and the rate applying over the less expensive route. The Court said, at page 973:

> "This, then, is not a case of reparation on account of unlawful or unreasonable tariffs".

In *Northern Pacific Ry. Co. v. Solum, supra*, this Court said at page 482:

> "In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly, its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal'."

This Court held that whether the conditions are reasonably equal presents an administrative question for the Interstate Commerce Commission. If the Commission should determine that the "conditions are reasonably equal", it must be concluded that the carrier violated its obligation to the shipper to ship by the cheaper route, and the shipper is entitled to recover in a court of law the difference between the charges paid and those that would have accrued over the cheaper route.

In the case at bar, the petitioner filed a complaint with the Interstate Commerce Commission seeking an administrative finding as to whether the facts surrounding the movement justified the conduct of the respondent carrier in transporting the considered shipments over the higher rated interstate route, so that such finding would be in aid of the Court in determining whether petitioner is entitled to prevail in this action. Cf. *United States v. Western Pacific R. Co.*, 352 U. S. 59. It is respectfully submitted that the Commission had power to make such finding.

While *T. I. M. E.* deprives the Commission of jurisdiction to determine the intrinsic reasonableness of past motor carrier rates, that case should not be interpreted so as to entirely prohibit the Commission from making findings on any other administrative issues in aid of the courts in litigation pending therein.

In *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438 (District of Columbia, 1959), the Court in discussing *T. I. M. E.*, said at page 446:

> "This Court does not hold that *all* common-law remedies heretofore available at common law against motor carriers did not survive the Motor Carrier Act of 1935 * * *."

It is submitted that *T. I. M. E.* does not authorize the abolition of a cause of action for motor carrier misrouting. The factors that persuaded the majority of the Justices in that case to make their decision are not present in a case of misrouting. This rationale is well expressed in the analysis made by Judge Moore in his dissenting opinion, below (*infra*, Appendix A, pp. 16-22). Whereas Congress has provided the shipper with an opportunity to protest the reasonableness of rates filed by motor carriers with the Interstate Commerce Commission before the effective date thereof, no similar protection is afforded a shipper against misrouting by a carrier.

Certainly, equity and good conscience would dictate, that under the circumstances existing in this case, as well as in all misrouting cases, the shipper should have a remedy for the patent wrong committed by the carrier. In the case at bar, the carrier by its own wrongful conduct has become unjustly enriched at the expense of the shipper in the sum of $10,000.00. No carrier should be permitted to take refuge in this Court's decision in the *T. I. M. E.* case in an effort to be immunized against liability for such wrong. If this Court allows the decision of the Courts below to

become the law of the land, some motor carriers may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and mulcting the shipping public of millions of dollars a year without fear of civil prosecution. *T. I. M. E.* should be limited to its own facts and should not be extended to deprive shippers of their common law right to recover damages for carrier misrouting. It is respectfully submitted that the instant suit to recover for misrouting is judicially cognizable and that the Courts below were in error in making a contrary determination.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

HARRY TEICHNER,
Attorney for Petitioner.

October 2, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 268—October Term, 1960.

(Argued February 23, 1961 Decided July 25, 1961.)

Docket No. 26685

HEWITT-ROBINS INCORPORATED,
Plaintiff-Appellant,

—against—

EASTERN FREIGHT-WAYS, INC.,
Defendant-Appellee.

Before:

HINCKS and MOORE, *Circuit Judges*,
and BRENNAN, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*, and judgment entered thereon, dismissing appellant's complaint pursuant to Rules 12-b, 12-c and Rule 56 of the Federal Rules of Civil Procedure, 187 F. S. 722. *Affirmed.*

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* Sitting by designation.

HARRY TEICHNER, Brooklyn 1, New York, *for plaintiff-appellant.*

GOLDMAN & DRAZEN, New York, New York (Milton D. Goldman and Wilfred R. Caron on the brief), *for defendant-appellee.*

BRENNAN, *District Judge*:

The question involved in this litigation requires the application of the provisions of the Interstate Commerce Act (49 U. S. C. 301-327), sometimes known as the Motor Carrier Act, to the facts disclosed in the complaint. The Court below held the complaint to be insufficient under Rules 12-b, 12-c and 56 F. R. C. P. to present a justiciable issue. A brief statement of facts is set out below.

During the period from January 1953 to February 1955, the appellant delivered to the appellee at Buffalo and New York City numerous unrouted shipments of cartons containing foam rubber pads for transportation between the two above cities. The service was performed by the appellee over an interstate route. The freight charges, in accordance with the filed tariff for such route, were paid by appellant who seeks to recover some $10,000 which represents the excess of said charges over those applicable to an alternate intrastate route.

The appellee, hereinafter referred to as "Eastern," is a certified common carrier by motor vehicle, possessing operating rights between Buffalo and New York City over both interstate and intrastate routes. The applicable rates for the interstate movement were somewhat higher than the rates for the intrastate movement as fixed in the tariffs filed with the Interstate Commerce Commission and the Public Service Commission of the State of New York.

The complaint alleges specifically that the action "arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327." It is further alleged therein that the "* * * rates charged * * * and the practice of the defendant in misrouting the shipments * * * were unjust and unreasonable in violation of Section 216, Part II, of the Interstate Commerce Act (U. S. Code, Title 49, Section 316)." Other allegations are found in the complaint asserting the unreasonableness of the rates charged, all of which are put in issue by the answer. The appellant recognizes the jurisdiction of the Interstate Commerce Commission in the matters referred to in the above allegations. The complaint requests a stay of the determination of the issues involved until the Interstate Commerce Commission could determine "the reasonable and just rates for the transportation of the aforesaid shipments" in a proceeding to be instituted by appellant upon the commencement of the action. It may be stated that such a proceeding was taken and an administrative determination was made holding that Eastern's routing practice, as indicated above, was unreasonable. A cease and desist order to operate prospectively was entered. Such determination is challenged by Eastern in an action to review same. The action is pending in the United States District Court for the District of New Jersey.

Subsequent to the commencement of this action, the Supreme Court handed down the decision reported as *T. I. M. E. Inc. v. United States*, 359 U. S. 464. The lower court relied upon that decision in holding that the complaint, insofar as it is based upon the statute, does not state a claim upon which relief may be granted. The appellant's argument that this action may be distinguished from the holding in the *T. I. M. E.* case, because the later decision involved rates which were intrinsically unreasonable while

here the rates are unreasonable by reason of misrouting, is not persuasive. Under Part I of the Interstate Commerce Act, 49 U. S. C. A. §§1, *et seq.*, "Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question. * * *" *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 482-483.[1] The same practice when arising under the Motor Carrier Act, §§201, *et seq.*, Part II of Interstate Commerce Act, 49 U. S. C. A. §§301, *et seq.*,[2] must necessarily be an administrative question. For there is no significant difference of language between the applicable sections of Part I of the Interstate Commerce Act and of the Motor Carrier Act. It follows that the rationale of the *T. I. M. E.* case, pages 172, *et seq.*, is directly applicable here; if, as *T. I. M. E.* holds, under the saving clause of §216(c) of the Motor Carrier Act, 49 U. S. C. A. §316(c), no common law remedy is saved to a

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[1] Part I of the Interstate Commerce Act, 49 U. S. C. A. §1(5), with respect to carriers by rail provides that "all charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." 49 U. S. C. A. §1(6) provides that "every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." 49 U. S. C. A. §15(1) provides that whenever * * * the Commission * * * shall be of opinion * * * that any individual or joint * * * practice whatsoever * * * is or will be unjust or unreasonable * * * the Commission is authorized and empowered to determine * * * what individual * * * practice is or will be just, fair, and reasonable."

[2] Similarly, the Motor Carrier Act §§216(b) and (d), 49 U. S. C. A. §§316(b) and (d), provides that it "shall be the duty of every common carrier of property by motor vehicle * * * to establish * * * just and reasonable rates * * * and practices * * *" and that all such charges "shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." And §216(e) of the Motor Carrier Act, 49 U. S. C. A. §316(e), provides that whenever "the Commission shall be of the opinion that any individual * * * rate * * * or practice * * * is or will be unjust and unreasonable * * * it shall determine * * * the lawful rate or the lawful * * * practice."

shipper aggrieved by an unreasonable rate, which was an administrative question, no such remedy is saved to a shipper aggrieved by the application of an unreasonable route, which was also an administrative question as held in *Northern Pacific Ry. Co.* v. *Solum, supra.*

Affirmed.

MOORE, *Circuit Judge* (dissenting):

The merits of the only question now before the court to me seem so clear that it is difficult to conceive of any ground for disagreement. The question is: should plaintiff (appellant) be deprived of an opportunity to place its case before a trial court upon all the facts or, stated in different form, should the doors of the court house be permanently closed to it after a perusal of the pleadings. The doors have been closed by the district court; the majority here now securely bolts them. The only real issue which the complaint submits for determination is the misrouting of plaintiff's shipments. The majority, as did the District Court, bases its decision upon a recent opinion by the Supreme Court in *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959) wherein that court in a five-to-four decision held that a shipper of goods by motor carrier in post-shipment litigation cannot challenge the reasonableness of the carrier's charges which had been made in accordance with filed tariffs governing the shipment.

Unlike the *T. I. M. E.* case, no issue of reasonableness of rates is here presented in fact, the rates filed are not challenged. The gravamen of the complaint is that defendant carried the goods over the wrong route for which error it should not be charged.

Plaintiff has obtained a ruling from the Commission in an administrative proceeding that the practice was un-

reasonable." However, merely because the word "unreasonable" appears in the *T. I. M. E.* opinion, wherein a recovery for unreasonable rates was denied, does not make it logical to place the decision here upon the reasoning that *T. I. M. E.* held that no common law remedy was saved to a shipper aggrieved by an unreasonable rate, that the determination of "unreasonable rate" was an administrative question; also, therefore, because misrouting was unreasonable and so determined in an administrative proceeding, no common law remedy was available or preserved by the exceptive provisions of the statute (Section 216(j), 49 U. S. C. §316(j)(: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."). In my opinion, this is specious syllogistic reasoning wherein parallelism is sought to be created by looking only at the words "unreasonable" and "administrative" without analyzing the real basis underlying the result in the *T. I. M. E.* case. The opinions therein of Mr. Justice Harlan for the majority and Mr. Justice Black for the minority four members of the court trace the legislative history carefully and exhaustively. Their respective views are stated with great clarity and, although differing in result on the specific facts with which they were dealing, even the majority opinion does not preclude a decision that on the facts here presented plaintiff would not have a right to be heard in a federal court.

As the Supreme Court pointed out, "the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and * * * the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *." Thus "[u]nder the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may, on its own initiative or on complaint, suspend the effective-

ness of the proposed rate for an additional seven months while its reasonableness is scrutinized." (*T. I. M. E.*, pp. 479-480.) And as the *T. I. M. E.* decision further notes, this seven-month suspension period is usually ample to permit the adjudication of the rate's reasonableness. The issue in *T. I. M. E.*, therefore, was whether the shipper could recover in a common law action an asserted unreasonable charge when the rate had been previously filed with the Commission after notice to all concerned and had been approved by the Commission to the extent of permitting it to prevail when it could have been suspended. Congress having provided the shipper with such a built-in protection, it was not unreasonable to assume that the shipper's common law right to recover on the theory that the filed rate was unreasonable was implicitly extinguished by the Act. In fact, to allow such a remedy to stand would be inconsistent with and undercut the anticipatory procedures provided.

The situation is vastly different here. As to unreasonable routing practice, no built-in protection for the shipper has been provided. Nor does a shipper have notice that it will be routed around Robin Hood's Barn until after this has actually occurred. In effect the shipper is in a position similar to that of a shipper who has been charged a rate in excess of the filed tariff. In such a situation even the legislative history referred to in *T. I. M. E.* indicates that such overcharges can still be recovered in a court proceeding.[1] That decision also suggests a distinction both per-

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[1] *T. I. M. E.*, footnote 18, pp. 477-478, reads in part:

"It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of 'an existing interpretation' of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of

tinent and applicable here. The shipper in *T. I. M. E.* was relying on certain legislative history to support its view that there existed a common law remedy for the recovery of unreasonable rates. In reading this history contrary to the shipper's view, the Court noted Commissioner Eastman's testimony as distinguishing "between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff." The former situation seems clearly applicable to this case, since it is claimed by plaintiff, not that the tariff rate itself is unreasonable, but that the application of this rate to the particular shipment was unreasonable.

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a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be 'unreasonable' though embodied in a filed tariff. The Commissioner said:

"'So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges.

"'The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands.' (Emphasis added.)

"Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791-792."

The Supreme Court "has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight." *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). Although it does not reach the status of an agency interpretation, the analysis of the situation now before this court made by the Interstate Commerce Commission, Office of the General Counsel, with respect to the effect of the *T. I. M. E.* case on this case is so accurate that it is entitled, in my opinion, both to respect and to weight.

> "Thus, the claim [in the instant case] is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T. I. M. E.* and *Davidson* cases do not purport to deal with the present situation.
>
> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier. For example, in *Wooleyan Transportation Co.* v. *George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was

required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

"* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Pedricktown, * * * Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay.

"* * * Here, however, the plaintiff, with the obvious direct intrastate route open to it, took the defendant's goods around Robin Hood's barn in getting them from Montclair to Pedricktown."

Counsel concludes (as do I) that:

"As I have indicated, the *T. I. M. E.* and *Davidson* cases do not require the conclusion that a suit to recover for misrouting is not judicially cognizable."

As Mr. Justice Black pointed out in his dissent in *T. I. M. E.*:

"There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383.[1] Nor can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreason-

able rates and in fact expressly made such rates illegal.[2] It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims."[3]

There may be sufficient reasons for denying redress in the courts to shippers for claims that filed rates are unreasonable but it by no means follows that shippers should be deprived of access to the courts for all wrongful acts committed by motor carriers, for example, mishandling, erroneous billing, misrouting, etc.

Such a determination would not prejudice the carrier's defenses such as agreement to the interstate route, payment of the charges with knowledge, acquiescence, estoppel, laches, etc., any or all of which may well defeat plaintiff's claim but at least plaintiff would thus have a determination on the merits and not be left without remedy merely because its complaint mentioned a statutory basis for its asserted claim.

I would reverse.

APPENDIX B

(Judgment)

(Filed July 25, 1961)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July, one thousand nine hundred and sixty-one.

Present:—HON. CARROLL C. HINCKS,

HON. LEONARD P. MOORE,
Circuit Judges,

HON. STEPHEN W. BRENNAN,
District Judge.

HEWITT-ROBINS INCORPORATED,
Plaintiff-Appellant,

—v.—

EASTERN FREIGHT-WAYS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order and judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.